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The California Constitution proclaims, "[a]ll political power is inherent in the people,"[1] and further provides that "[t]he initiative is the power of the electors to propose . . . amendments to the Constitution."[2] In addition to these provisions empowering the voters to make law, the constitution declares that the "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[3] This section embodies the doctrine of independent state grounds and means that federal interpretation of federal rights should not limit the interpretation of similar rights expressed in California's Declaration of Rights. The doctrine provides the basis for protecting rights in California not protected under the Federal Constitution. While this Article focuses on rights which affect those accused of crimes, California courts have relied on the doctrine of independent state grounds to expand the rights of Californians in other areas as well. For example, Californians have invoked their inalienable right to privacy[4] to protect employment records, health records, financial records, scholastic records, and sexual history.[5] The United States Supreme Court, on the other hand, gives little protection to such information under the Federal Constitution.[6] Through the independent state grounds doctrine, the California Constitution also affords Californians greater protection of their right to freedom of expression than does the analogous federal right.[7]

The voters of California, however, have recently used the initiative to force the interpretation of California constitutional rights to depend upon interpretations of similar rights under the United States Constitution. This is undesirable because, although the United States and California Constitutions use similar language, to preserve the integrity of California's constitution, California courts should not be forced to follow federal precedents.[8] Without such independence California's Constitution and its declaration of rights become meaningless

1. CAL. CONST. art. II, § 1.

2. CAL. CONST. art. II, § 8(a).

3. CAL. CONST. art. I, § 24.

4. CAL. CONST. art. I, § 1.

5. Margaret C. Crosby, *New Frontiers: Individual Rights Under the California Constitution*, 17 HASTINGS CONST. L.Q. 81, 95-96 n.87-91 (1989).

6. *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 600 (1977) (health records).

7. Robins v. Pruneyard Shopping Center, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

8. Of course, pursuant to the Due Process Clause of the Fourteenth Amendment, the rights of Californians may not fall below what has been called the "federal floor." At a minimum, states are bound by the Due Process Clause, but states can grant *greater* rights. *See, e.g.*, Harry C. Martin, *The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. REV. 1749, 1750 (1992).

and irrelevant. Furthermore, the voters have altered the constitutional framework by a simple majority vote, allowing whim, caprice, and fear to dictate California constitutional interpretation.

On June 5, 1990, California voters passed Proposition 115, the self-proclaimed "Crime Victims Justice Reform Act." Proposition 115 added three sections to article I of the California Constitution[9] and attempted to amend section 24[10] of the same article.[11] These sections of Proposition 115,[12] as well as sections of Proposition 8 (the "Victims' Bill of Rights,"[13] adopted in June 1982), altered California's criminal justice system. Proposition 8 set forth the constitutional rights of crime victims and Proposition 115 set forth those of the people of the State of California.[14]

These constitutional amendments create clear conflicts between the rights of criminal defendants and the rights of both crime victims and other California citizens.[15] A more subtle conflict, however, exists between the right of the voters to initiate constitutional changes and the doctrine of independent state grounds. This conflict arises where California state courts rely on the state constitution to define the rights of Californians, but the voters elect to force the state to adhere to federal definitions of similarly worded rights.

This Article addresses the *process* used to achieve the results of Propositions 8 and 115. In order to achieve greater balance between California's important, independent constitutional provisions and voters' rights, this Article proposes that the voters should be able to change California's Declaration of Rights only by a super-majority vote. This restriction would afford greater permanence to the fundamental rights set forth in California's Declaration of Rights, while still allowing flexibility. Greater stability of rights would give California

9. CAL. CONST. art. I, §§ 14.1, 29, and 30.

10. For text of § 24, *see infra* text accompanying note 263.

11. The California Supreme Court invalidated the proposed amendment to § 24 in Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990). *See infra* text accompanying notes 262-75, 296 for a discussion of this section.

12. The Proposition also added sections to California statutes. However, this Article will focus on the constitutional changes.

13. This Article will focus on the addition of § 28 to Article I, subpart (d), the "Truth-in-Evidence" provision. However, Proposition 8 added other subparts to the California Constitution.

14. CAL. CONST. art. I, § 29 added by Proposition 115, declares the right of "the people of the State of California . . . to due process of law and to a speedy and public trial."

15. For an analysis of each section of Proposition 115, see Lisa A. Lunsman, *Proposition 115 - "The Crime Victims Justice Reform Act": Reformation of an Inept System or a Constitutional Disaster?*, 22 U. WEST L.A. L. REV. 59 (1991).

courts the ability to independently interpret the state constitution without being forced to adhere to federal precedent.

Part I of this Article discusses the fundamental nature of the rights found in California's Declaration of Rights, and the need to maintain their stability. It also discusses the problems inherent in forcing the interpretation of California rights to follow federal interpretations. Part II traces the development of the independent state grounds doctrine in the United States, and specifically, in California. Part III explains the history and procedure of the voter initiative in California, while Part IV analyzes how Propositions 8 and 115 have limited the ability of the California judiciary to give independent meaning to California's Declaration of Rights. Part V examines other proposals and concludes that a super-majority vote for changes to the Declaration of Rights would best achieve a balance between the right of the voters to alter the Declaration of Rights and the right to an independent state constitution.

I. Fundamental Rights and Forced Linkage

The first general objective of this Article is to achieve an insulation of fundamental rights from voter whim, passion, and fear. Propositions 8 and 115 affect rights asserted primarily by criminal defendants, which are generally unpopular rights. Motivated by perceptions that California "courts . . . have demonstrated more concern with the rights of criminals than with the rights of innocent victims,"[16] the voters have altered the constitution to restrict these "criminal rights" and have taken away from California courts the ability to independently interpret the state's constitution.

The rights set forth in California's Declaration of Rights are fundamental and should be permanent. A number of commentators have emphasized the difference between constitutions and statutory law. Justice Cardozo wrote, "[a] constitution states or ought to state not rules for the passing hour but principles for an expanding future."[17] A constitution should "set down fundamental and enduring first principles"[18] in general terms. Former Chief Justice Traynor of the California Supreme Court, wrote that if a constitution "is to retain respect it

16. SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET; PRIMARY ELECTION 34 (June 8, 1982) (argument in favor of Proposition 8 by Mike Curb, Lieutenant Governor).

17. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 24 (1921).

18. David Fellman, *What Should a State Constitution Contain?*, *in* STATE CONSTITUTIONAL REVISION 137, 156 (W. Brooke Graves ed. 1960). *See also* CHARLOTTE IRVINE & EDWARD M. KRESKY, HOW TO STUDY A STATE CONSTITUTION 2 (1962).

must be free from popular whim and caprice which would make of it a mere statute."[19]

With the increased use of the voter initiative, some state constitutions are no more than super-statutes. Two arguments, one historical and one structural, support the premise that the rights found in declarations of rights are fundamental.

A. Historically Fundamental Rights

The rights declared in article I of the California Constitution, similar to rights contained in other state constitutions and the Federal Constitution, have historically been accorded "fundamental" status.[20] The roots of these fundamental rights have been traced back to English documents such as the Magna Carta of 1215, the Petition of Right of 1628, and the Bill of Rights of 1689.[21] Although the Petition of Right declared the fundamental rights of Englishmen, none of these documents provided for enforcement of rights.[22] In fact, the Bill of Rights was enacted as a statute which Parliament could later amend or repeal.[23] Despite this, the rights declared in these documents later formed "the core of the body of rights of Englishmen that American colonists claimed as inherently their own."[24] Early colonial charters, while not enumerating rights, simply declared that the colonists retained the rights of Englishmen.[25] Later colonial enactments and declarations began to state individual rights with greater detail.[26]

19. Roger Traynor, Amending the United States Constitution (1927) (unpublished Ph.D. thesis, University of California (Berkeley)); *see also* Comment, *California's Constitutional Amendomania*, 1 STAN. L. REV. 279, 281 n.16 (1949).

20. This historical analysis is *not* based on how these rights were *originally* interpreted, or what they were intended to mean. *Historically* these rights have been treated as fundamental.

21. 1 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 4-47 (1980) [hereinafter SCHWARTZ, ROOTS].

22. BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND 11-14 (1977) [hereinafter SCHWARTZ, GREAT RIGHTS].

23. *Id.* at 1.

24. *Id.* at 7.

25. 1 SCHWARTZ, ROOTS, *supra* note 21, at 53.

26. The Maryland Act for the Liberties of the People of 1639 set out the right of the people not to be imprisoned or dispossessed of their property before being judged under the laws of the province. *Id.* at 67-68. The 1641 Massachusetts Body of Liberties provided for the right to counsel, *id.* at 74, and stated that "[no] man shall be forced by Torture to confesse any Crime against himselfe nor any other." *Id.* at 79. The Boston List of Infringements and Violations of Rights included assertions of rights not previously declared in other documents, particularly the violation of "[o]fficers . . . break[ing] thro' the sacred rights of the Domicil, ransack[ing] men's houses, destroy[ing] their securities, [and] carry[ing] off their property." *Id.* at 199.

Virginia's Declaration of Rights and Constitution of 1776 represents the "first true Bill of Rights in the modern American sense, since it is the first protection for the rights of the individual to be contained in a Constitution adopted by the people."[27] This Declaration repeated several rights found in previous documents, and included some new rights, such as the right against general warrants and the freedom of the press.[28] The Virginia Declaration of Rights and Constitution served as the model for eight other states which adopted constitutions before the Constitutional Convention convened in Philadelphia in 1787.[29] The American draftsmen recognized the need to do more than simply declare that the colonists possessed fundamental rights. In contrast to their English precursors, American bills of rights provided for enforcement and insulation of "individual rights from the changing winds of legislative fancy."[30] Their notion that certain "fundamental rights could not be ceded away colored the American view of fundamental [rights] law."[31] The colonists and the Framers of the Federal Constitution preserved fundamental rights from frequent alterations by making the amendment procedures difficult.[32] While fundamental rights enumerated in the California Constitution may be amended by the legislature, such an amendment must pass each house by a two-thirds vote and must then be approved by a majority of voters. Thus, fundamental rights are afforded a greater degree of insulation than simple legislative enactments.

B. The Structure of Constitutions

Generally, constitutions consist of two parts. One part of a constitution sets forth the framework under which the government operates, spelling out the mechanics and delineating the powers and

27. 2 SCHWARTZ, ROOTS, *supra* note 21, at 231.

28. *Id.* at 233.

29. *See id.* at 256-382. These states and their respective years of adoption are: Pennsylvania (1776), *id.* at 262-63; Delaware (1776), *id.* at 276; Maryland (1776), *id.* at 279; North Carolina (1776), *id.* at 286; Connecticut (1776), *id.* at 289; Vermont (1777), *id.* at 319; Massachusetts (1780), *id.* at 337-39; and New Hampshire (1783) *id.* at 374-75. The following states did not adopt separate Bills of Rights, but adopted constitutions which contained several guarantees of individual liberties: New Jersey (1776), *id.* at 256; Georgia (1777), *id.* at 291; New York (1777), *id.* at 301, and South Carolina (1778), *id.* at 325. *See* WALTER F. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 1-29 (1910).

30. SCHWARTZ, GREAT RIGHTS, *supra* note 22, at 1.

31. Suzanna Sherry, *The Founder's Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1132 (1987).

32. *See, e.g.*, U.S. CONST. art. V, requiring three-fourths of the states to approve any amendment proposed by two-thirds of both houses of Congress.

limitations on each of the three branches.[33] This has been described as the section which imposes "internal" checks and balances upon the government. The second part of a constitution provides "external" checks which are contained in the bills or declarations of rights.[34] This part limits the government's power over the people by declaring rights upon which the government must not infringe.[35]

The Bill of Rights in the Federal Constitution consists of amendments, added in 1791, four years after the Constitution was drafted. State constitutions adopted both before and after the convention contained a declaration or bill of rights as their first article.[36] These sections were separate from the sections which provided the framework of the state government. In fact, the title of Virginia's constitution was "Declaration of Rights and Constitution,"[37] according separate titles to the two parts. This powerfully indicates that rights listed in declarations of rights were viewed separately and not simply as the enactment of law or the framework of government.[38]

Similarly, article I of the California Constitution is entitled "Declaration of Rights." By setting forth rights in the first article of the constitution, California and other states have implicitly acknowledged the importance of these rights.

C. What's Wrong With "Forced Linkage"?[39]

It makes no sense to link state constitutional interpretation of fundamental rights to the federal interpretation of those rights. Such an approach eviscerates state declarations of rights: if state courts must adhere to federal definitions of rights, then state declarations of rights become superfluous.

33. Michael Walzer, *Constitutional Rights and the Shape of Civil Society*, *in* THE CONSTITUTION OF THE PEOPLE 113 (Robert E. Calvert ed., 1991).

34. *Id.* at 114.

35. *Id.*

36. Sherry, *supra* note 31, at 1132-33; Robert S. Rankin, *The Bill of Rights*, *in* MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 159, 160-61. (W. Brooke Graves ed., 1960).

37. *See supra* text accompanying note 27.

38. Suzanna Sherry, *The Early Virginia Tradition of Extra-Textual Interpretation*, 53 ALB. L. REV. 297, 298-99 (1989).

39. The term "forced linkage" is used to "describe the impact of electoral decisions . . . requiring state courts to equate state constitutional law with federal constitutional law." Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653, 657 (1987).

David Skover has identified several other important objections to forced linkage or "lock-step" interpretation.[40] First, where federal precedent is ambiguous, state courts must attempt to predict how the United States Supreme Court would resolve the particular issue.[41] When the Supreme Court issues an opinion regarding a particular right, it cannot address all possible applications and permutations of the announced rule, and several questions must be left unanswered.[42] Lower federal courts and state courts must refine the intricacies of the ruling and hope the Supreme Court upholds their interpretations. Without the freedom to rely on state constitutions, state judiciaries may become frustrated predicting the future direction of federal law.

Second, "lock-step" interpretation "is likely to disregard significant differences in the texts of state and federal constitutional liberty guarantees."[43] Where the wording of a particular right in a state constitution is different from the wording of the analogous federal right, a lock-step approach ignores the textual differences in favor of federal constitutional doctrine. As such, lock-step interpretation precludes, or at least discourages, any inquiry into the basis for textual differences and whether they might support different results.

Even where textual differences could be the basis for independent interpretation, forced linkage precludes state courts from interpreting textually identical guarantees independently. The result is a "divided Constitution,"[44] where some provisions are accorded an independent interpretation while others are not. For example, as a result of Propositions 8 and 115, enforcement of the state guarantees to be free from unreasonable searches and seizures and from self-incrimination are now linked to federal enforcement.[45] The California constitutional guarantees of freedom of expression,[46] freedom of religion,[47] and privacy,[48] however, are still given interpretations in-

40. David M. Skover, *Address: State Constitutional Law Interpretation: Out of "Lock-Step" and Beyond "Reactive" Decisionmaking*, 51 MONT. L. REV. 243 (1990).

41. *Id.* at 247.

42. For examples, see Robert M. Cover and T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1054-55 (1977).

43. Skover, *supra* note 40, at 247.

44. *Id.* at 248 (citing Ronald K.L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1117-23 (1985)).

45. *See infra* text accompanying notes 209-14.

46. CAL. CONST. art. I, § 2(a).

47. CAL. CONST. art. I, § 4; *see also* Melissa L. Nelson, Comment, *Whose Beliefs Are Entitled to Protection: Resolving the Conflict Between the California and Federal Standards*, 27 SANTA CLARA L. REV. 377 (1987).

dependent of federal interpretation of similar rights.[49] There is no principled reason for linking interpretation of some rights, but not others, to federal precedent.

II. The Doctrine of Independent State Grounds

A. Development of the Doctrine

The doctrine of independent state grounds is premised on the idea that a state constitution, particularly a state's declaration of rights, is a source of rights independent of the rights set forth in the Federal Constitution. Although the provision in the California Constitution which proclaims that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution,"[50] was not adopted until 1974,[51] this principle *predates* the Federal Constitutional Convention of 1787. Before the federal convention even began, nine of the original states had adopted independent bills of rights.[52] During the Convention, George Mason proposed that the Federal Constitution include a bill of rights, however, other delegates believed that this was not necessary, since the state constitutions included individual rights and guarantees.[53] Furthermore, while the delegates discussed the degree of power to be retained by the federal government, they affirmed that the states were the protectors of individual liberties.[54]

Once the Federal Bill of Rights was adopted in 1791, it was viewed as a restraint only upon the federal government, and was not binding upon the states.[55] During this time, individuals had to look to their state constitutions to protect their rights. This period of time has been called the period of "dual federalism."[56]

48. CAL. CONST. art. I, § 1. *See also* Robert S. Gerstein, *California's Constitutional Right to Privacy: The Development of the Protection of Private Rights*, 9 HASTINGS CONST. L.Q. 385 (1982).

49. *See supra* text accompanying notes 4-7.

50. CAL. CONST. art. I, § 24.

51. This was a constitutional measure passed by the legislature and approved by the voters in a referendum.

52. *See supra* note 29 and accompanying text.

53. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 588 (1987).

54. 2 SCHWARTZ, ROOTS, *supra* note 21, at 436; 3 FARRAND, *supra* note 53, at 254.

55. Barron v. Baltimore, 32 U.S. 243, 247 (1833).

56. Slobogin, *supra* note 39, at 657 n.11.

After the Civil War, the federal government stepped in to protect individual rights against the abuses of state power[57] by adopting the Fourteenth Amendment.[58] The United States Supreme Court slowly began to give meaning to the Due Process Clause by examining whether certain rights provided for in the Federal Constitution were fundamental and applicable to the states. This period of incorporation began with *Chicago, Burlington & Quincy R.R. v. Chicago*[59] in which the Supreme Court determined that the Takings Clause[60] applied to the states pursuant to the Due Process Clause of the Fourteenth Amendment.[61] The Court reasoned that just compensation for the taking of private property for public use is an "essential element of due process of law."[62] In *Gitlow v. New York*,[63] the Justices simply stated that they "may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[64] The Court eventually concluded that all sections of the First Amendment applied to the states.[65] The Supreme Court was notably slower in applying rights embodied in the Fourth,[66] Fifth,[67] Sixth,[68] and Eighth[69] Amendments, the "criminal

57. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N. Y. U. L. REV. 535, 537 (1986).

58. The Amendment states, in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

59. 166 U.S. 226 (1897).

60. U.S. CONST. amend. V.

61. *Chicago*, 166 U.S. at 253.

62. *Id.*

63. 268 U.S. 652 (1925).

64. *Id.* at 666.

65. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (limiting the use of state libel laws by public officials and public figures); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (barring state-required prayers in public schools).

66. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

67. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

68. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be in-

rights,"[70] to the states. One of the first cases to consider the application of these amendments to the states was *Hurtardo v. California*[71]. In *Hurtardo*, the Court determined that the Fifth Amendment requirement of a grand jury indictment did not apply to the states.[72] Several years later, the Court determined in *Twining v. New Jersey*[73] that the privilege against self-incrimination, though important, was merely a rule of evidence and not a "fundamental principle of liberty and justice,"[74] and therefore not within the meaning of due process.

While the Warren Court[75] is usually credited with incorporating nearly all criminal procedural rights to the states through the Due Process Clause of the Fourteenth Amendment, incorporation of these rights actually began in 1923. In *Moore v. Dempsey*,[76] the Supreme Court found that the right to a fair trial was protected by the Due Process Clause of the Fourteenth Amendment.[77] Later, in *Powell v. Alabama*,[78] the Supreme Court found that due process requires that criminal defendants in capital cases receive effective assistance of counsel, and applied this requirement to the states.[79] In 1949, the Court extended the Fourth Amendment's protection against unreasonable searches and seizures to the states.[80] Finally, between the

formed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

69. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." U.S. CONST. amend. VIII.

70. The rights set forth in these amendments are usually asserted by criminal defendants. However, these rights protect all people in the United States. It is unfortunate that these rights are treated as belonging only to those accused of crime. If, for example, police conduct an illegal search in which they do not find any evidence of a crime and they do not arrest the individual whose rights they have violated, the only way the individual may presently vindicate her rights is to seek administrative relief or file a civil suit, neither of which is a very powerful remedy. Less than avid protection of "criminal rights" has led to a diminution of rights for all. For example, state police have begun stopping motorists and then strongly suggesting that the motorist consent to a vehicle search. In South Carolina, out of 4,000 cars searched in 1991, drugs were discovered in less than 15%. In Pennsylvania, out of 583 stops, 108 resulted in arrests. Joe Hallinan, *Latest Drug War Tactic: Car Searches on Highway*, S.F. EXAMINER, Sept. 6, 1992, at A4.

71. 110 U.S. 516 (1884).

72. *Id.* at 538.

73. 211 U.S. 78 (1908).

74. *Id.* at 106.

75. Earl Warren was the Chief Justice of the Supreme Court from 1953 to 1969.

76. 261 U.S. 86 (1923).

77. *Id.* at 91.

78. 287 U.S. 45 (1932).

79. *Id.* at 111.

80. Wolf v. Colorado, 338 U.S. 25 (1949). This guarantee was meaningless until the Court also applied the exclusionary rule to state proceedings in Mapp v. Ohio, 367 U.S. 643

years 1962 and 1969, the Warren Court applied eight different criminal procedural rights to the states.[81]

Commentators have noted that during this period of rapid "federalization" of rights, state courts stopped looking to their own constitutional guarantees because it was "easy for the state courts . . . to fall into the drowsy habit of looking no further than federal constitutional law."[82] Furthermore, states often had not provided for some rights to the extent demanded by the Due Process Clause. As a result, the Supreme Court raised state protection to the federal level. Not surprisingly, most state courts looked to the guarantees pronounced by the United States Supreme Court and simply fell in line with that Court's interpretation, not considering what their own state constitution required.[83] This era has been termed "co-option."[84] State courts simply co-opted the United States Supreme Court's interpretation of rights.

Beginning with the term of Chief Justice Burger[85] and continuing with that of Chief Justice Rehnquist,[86] the United States Supreme Court began to restrict the scope of the Federal Bill of Rights.[87] As a result, state courts were motivated to look to their own constitutional guarantees instead of automatically relying on the federal counterparts.[88]

(1961). William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977).

81. Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment); Gideon v. Wainwright, 372 U.S. 335 (1963) (assistance of counsel in all prosecutions); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination); Pointer v. Texas, 380 U.S. 400 (1965) (accused's right to confront witnesses against her); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to a speedy and public trial); Parker v. Gladden, 385 U.S. 363 (1966) (right to trial by an impartial jury); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process for obtaining witnesses); Benton v. Maryland, 395 U.S. 784 (1969) (bar against double jeopardy). Brennan, *supra* note 80, at 493-94.

82. A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 878 (1976).

83. Slobogin, *supra* note 39, at 661.

84. *Id.* at 657.

85. After Earl Warren, Warren Burger was Chief Justice until 1987.

86. William Rehnquist became the Chief Justice of the Supreme Court in 1987.

87. *See generally* Slobogin, *supra* note 39, at 661-62 n.47; Howard, *supra* note 82, at 874-76; Michael G. Colantuono, Note, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty and Constitutional Change*, 75 CAL. L. REV. 1473 n.1 (1987).

88. Brennan, *supra* note 80, at 495-502; Brennan, *supra* note 57, at 548; Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081, 1088-91 (1985) [hereinafter Mosk, *State Constitutionalism*]; Stanley Mosk, *California*

Although California's constitution was drafted fifty-eight years after the Federal Bill of Rights, the drafters of California's Declaration of Rights did not rely exclusively on the first ten amendments to the United States Constitution. The drafters of the 1849 California Constitution were aware that in *Barron v. Baltimore*,[89] the United States Supreme Court had announced that the guarantees embodied in the Federal Bill of Rights did not apply to the states. Therefore, while certain guarantees contained in California's Declaration of Rights are similar to their federal counterparts, the drafters recognized that the California Declaration of Rights and not the Federal Bill of Rights would be the source of guarantees for the people of California.

Interestingly, the 1879 version of the California Constitution initially included a section which declared the United States Constitution to be "the great charter of our liberties;" this language, however, was later rejected.[90] Furthermore, while it has been stated that the protection against unreasonable searches and seizures "*equals* the Fourth Amendment of the United States Constitution,"[91] other evidence indicates that the original language of the Declaration of Rights was in fact derived from the New York and Iowa Constitutions.[92] Even if the provisions were intended to be identical to the Federal Constitution, this may simply be a result of the drafters agreement with the principles set forth in the Federal Bill of Rights, and not evidence of the drafters intent that the California courts adopt and follow federal interpretations of similar language. In fact, evidence indicates that the drafters recognized the *state* judiciary would define the parameters of those provisions.[93]

Constitutional Symposium: Introduction, 17 HASTINGS CONST. L.Q. 1 (1989) [hereinafter Mosk, *Symposium*].

89. 32 U.S. 243, 250-51 (1833).

90. SWISHER, MOTIVATION AND POLITICAL TECHNIQUE IN THE CALIFORNIA CONSTITUTIONAL CONVENTION 1878-1879 93 (1930). The California Constitution contains language similar to the above: "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land." CAL. CONST. art. III, § 1. This, however, sounds more like a recognition of the Supremacy Clause.

91. Ira Reiner & George Glenn Size, *The Law Through a Looking Glass: Our Supreme Court and the Use and Abuse of the California Declaration of Rights*, 23 PAC. L.J. 1183, 1211 (1992).

92. ROCKWELL D. HUNT, THE GENESIS OF CALIFORNIA'S FIRST CONSTITUTION (1846-1849) 56 (1973); Joseph R. Grodin, *Some Reflections on State Constitutions*, 15 HASTINGS CONST. L.Q. 391, 393 (1988).

93. Jerome B. Falk, Jr., *The Supreme Court of California 1971-1972 Foreward, the State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273, 283 (1973).

B. Application of the Doctrine in California

1. Dual Federalism

The period called "dual federalism"[94] exemplifies the early application of the doctrine of independent state grounds. During this period, the United States Supreme Court had not yet required the states to follow the Federal Bill of Rights. California has been described as having lead "the nation in the development of independent interpretation."[95] Many of the fundamental rights protections the California Supreme Court premised on the state constitution presaged those the United States Supreme Court later found in the Federal Constitution. For example, the California Supreme Court invalidated the death penalty in *People v. Anderson*[96] four months before *Furman v. Georgia*[97] was decided. In *Anderson*, the court found that the drafters of the California Constitution purposefully drafted the phrase "cruel *or* unusual punishment"[98] rather than the "cruel *and* unusual"[99] language of the Federal Constitution. The court also looked to the history of the state constitutional convention and found that the drafters of the constitution intended to prohibit the use of capital punishment.[100] In 1955, six years before the United States Supreme Court applied the exclusionary rule to the states,[101] the California Supreme Court adopted the rule.[102] The California Supreme Court also determined that a defendant may object to the admission of evidence obtained in violation of another persons' rights,[103] despite the fact that no such right had been recognized under the Federal Constitution.[104] In interpreting California's guarantee against double jeopardy, the state

94. Slobogin *supra* note 39, at 657 (citing Walker, *American Federalism - Then and Now*, *in* THE BOOK OF STATES 23, 23 (1982)).

95. Robin B. Johansen, Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 301 (1977); *see generally* Falk, *supra* note 93; David J. Fine, et al. *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 325 (1973).

96. 493 P.2d 880 (Cal. 1972).

97. 408 U.S. 238 (1972) (upholding the constitutionality of the death penalty).

98. CAL. CONST. art. I, § 17 (emphasis added).

99. U.S. CONST. amend. VIII (emphasis added).

100. California voters subsequently overruled *Anderson* by passing a referendum the following November which amended the constitution by stating, in part, "[t]he death penalty . . . shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishment." CAL. CONST. art. I, § 27.

101. Mapp v. Ohio, 367 U.S. 643 (1961).

102. People v. Cahan, 282 P.2d 905 (Cal. 1955).

103. People v. Martin, 290 P.2d 855 (Cal. 1955). This is known as the vicarious exclusionary rule.

104. Goldstein v. United States, 316 U.S. 114 (1941).

supreme court held that when a defendant does not consent to a mistrial, another trial would put the defendant twice in jeopardy.[105] This ruling predated the incorporation of the federal right against double jeopardy,[106] and contradicted an earlier Supreme Court decision interpreting the federal right.[107] However, California's period of "dual federalism" also involved many abuses by the state judiciary in the area of criminal rights.[108]

The California Supreme Court gave state constitutional protection to a woman's right to terminate a pregnancy[109] four years before the United States Supreme Court recognized the right under the Federal Constitution.[110]

The recognition of these rights by California courts occurred before the United States Supreme Court had spoken on the issues, thus legitimizing the doctrine of independent state grounds. Without the doctrine, state courts would either have to wait until the United State Supreme Court has examined the issue, or guess as to how the Court might resolve the particular issue.[111]

The following cases illustrate the persuasive use of the independent state grounds doctrine by a California Supreme Court not bound by federal case law.

In the 1955 case of *People v. Cahan*,[112] the California Supreme Court revisited the issue of whether or not to adopt the exclusionary

105. Cardenas v. Superior Court, 363 P.2d 889 (Cal. 1961).

106. Benton v. Maryland, 395 U.S. 784 (1969).

107. Gori v. United States, 367 U.S. 364 (1961).

108. *See, e.g.*, Lisenba v. California, 314 U.S. 219 (1941) (defendant questioned for 48 hours, slapped, and held without indictment or arrest warrant); Rochin v. California, 342 U.S. 165 (1952) (defendant's stomach pumped to obtain narcotic capsules); Irvine v. California, 347 U.S. 128 (1954) (police entered defendant's home in his absence and wired it for electronic surveillance).

109. People v. Belous, 458 P.2d 194 (Cal. 1969), *cert. denied*, 397 U.S. 915 (1970).

110. Roe v. Wade, 410 U.S. 113 (1973).

111. In a recent state appellate court case concerning the application of Batson v. Kentucky, 476 U.S. 79 (1986), to gender-based peremptory jury challenges, the state court concluded that since the United States Supreme Court had not yet extended Batson to gender-based peremptory challenges, it "would be presumptuous on our part" to extend *Batson*. Eiland v. State, 607 A.2d 42, 59 (Md. Ct. Spec.App. 1992). However, the Court of Appeals of Maryland reversed the Court of Special Appeals, relying on the state constitution. Tyler v. State, 623 A.2d 648 (Md. 1993). The United States Supreme Court has since agreed to review a case involving a state's use of peremptory strikes to exclude all men from the jury. J.E.B v. T.B., 660 So. 2d 156 (Ala. Civ. App. 1992), *cert. granted*, 113 S.Ct. 2330 (May 17, 1993).

112. 282 P.2d 905 (Cal. 1955).

rule.[113] Only thirteen years earlier in *People v. Gonzales*,[114] the California Supreme Court had declined to follow the federal courts in adopting the exclusionary rule, despite the fact that the language protecting individuals from unreasonable searches and seizures in the state and federal constitutions is nearly identical.[115] In overturning its own precedent, the California Supreme Court looked to the language of prior United States Supreme Court decisions to determine whether a majority of states had adopted the rule. The court then independently addressed the policy arguments involved, stating that "one of the foremost public concerns is the police state, and recent history has demonstrated all too clearly how short the step is from lawless although efficient enforcement of the law to the stamping out of human rights."[116] The court went on to state that "[e]xperience has demonstrated . . . that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court."[117] Acknowledging that the language of the California protection against unreasonable searches and seizures is nearly identical to its federal counterpart, the court stated that "[i]n developing a rule of evidence applicable in the state courts, this court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them."[118] Though the California Supreme Court looked to United States Supreme Court precedent for persuasive value, it found important reasons to reject the federal authority.

In the same year that *Cahan* was decided, the California Supreme Court unanimously adopted the so-called "vicarious exclusionary rule," which the United States Supreme Court had rejected in 1942.[119]

113. Although the United States Supreme Court had applied the rights guaranteed in the Fourth Amendment to the states in Wolf v. Colorado, 338 U.S. 25 (1949), it was not until 1961 that the states were bound by the exclusionary rule. Mapp v. Ohio, 367 U.S. 643 (1961).

114. 124 P.2d 44 (Cal. 1942).

115. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV. "The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches may not be violated . . . ." CAL. CONST. art. I, § 13.

116. *Cahan*, 282 P.2d at 912.

117. *Id.* at 913.

118. *Id.* at 915.

119. Goldstein v. United States, 316 U.S. 114-17 (1942); *see also* Alderman v. United States, 394 U.S. 165, 171 (1969).

The California Supreme Court in *People v. Martin*[120] determined that a defendant may object to the admission of evidence obtained in violation of another person's rights.[121] The *Martin* court examined the federal exclusionary rule and stated that its rationale was based on providing a remedy for a defendant who had been wronged.[122] Based on *Cahan*, the court reasoned that the California exclusionary rule is grounded in three ideas: (1) that other remedies are not effective; (2) that the government should not be able to profit from its own wrongdoing; and (3) that the courts should not sanction such wrongdoing by admitting at trial the illegally obtained evidence.[123] *Martin* demonstrates that although the California Supreme Court had adopted the exclusionary rule, in part based on federal precedent, the court was not bound to follow the United States Supreme Court interpretation of the rule, and after careful consideration, chose not to.

Cases that involve protection against double jeopardy provide yet another example of "pure independent interpretation."[124] The California Declaration of Rights provides that "[p]ersons may not twice be put in jeopardy for the same offense. . . ."[125] The federal counterpart provides "nor shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb. . . ."[126] Before the United States Supreme Court applied the federal provision to the states in 1969,[127] the California Supreme Court addressed the question of whether a second trial would subject a defendant to double jeopardy when the trial court declares a mistrial *sua sponte* without the defendant's consent. The United States Supreme Court had determined in *Gori v. United States*,[128] that such a scenario would not violate the federal guarantee against double jeopardy. Despite this federal precedent, in 1961, in *Cardenas v. Superior Court*,[129] the California Supreme Court ruled that a second trial would place the defendant in double jeopardy. The California Supreme Court has

120. 290 P.2d 855 (Cal. 1955).

121. *Id.* at 857.

122. *Id.*

123. *Id.* While the court in *Martin* determined that the defendant had *standing* to object to the admission of the evidence, the court ultimately decided that the evidence, in that case, had not been illegally obtained. *Id.* at 858.

124. Johanson, *supra* note 95, at 306.

125. CAL. CONST. art. 1, § 15.

126. U.S. CONST. amend. V.

127. Benton v. Maryland, 395 U.S. 784 (1969).

128. 367 U.S. 364 (1961).

129. 363 P.2d 889 (Cal. 1961).

maintained and upheld the *Cardenas* standard,[130] even after the United States Supreme Court incorporated the federal guarantee.

These examples illustrate the capabilities of the California Supreme Court when it is not bound by the United States Constitution.[131] These are legitimate and persuasive uses of the state constitution. Because federal precedent was not binding, the California Supreme Court looked to federal case law for persuasive guidance. It adopted those precedents only after careful analysis. Furthermore, upon adopting a federal precedent, the California Supreme Court did not bind itself to *future* pronouncements by the United States Supreme Court on the same subject. Instead, the court examined federal precedent, much as it would look to the precedents of sister states for guidance.

2. *New Federalism*

Under Chief Justice Burger's leadership, the United States Supreme Court curtailed many of the "progressive" standards adopted by the Warren Court.[132] The California Supreme Court responded by resurrecting the doctrine of independent state grounds. This phase, dating from the early 1970s, has been termed the "New Federalism."[133]

Critics charged that since California had already adopted the United States Supreme Court's interpretation of particular rights, the California Supreme Court's sudden reassertion of the doctrine was result-oriented. The criticism notwithstanding, the California Supreme Court employed independent state grounds legitimately. The court failed, however, to persuade the voters of California that the results followed logically and historically from California precedent. The court also failed to explain the analysis which it would apply in the future when relying on the state constitution.

130. Curry v. Superior Court, 470 P.2d 345 (Cal. 1970).

131. I do not disagree with the incorporation of federal rights through the Due Process Clause of the Fourteenth Amendment. Without such initiative by the United States Supreme Court, individuals would have continued to suffer abuses and lawless behavior at the hands of most states. These examples illustrate the beneficial reliance upon state constitutions when individuals could not rely upon federal guarantees.

132. *See* Martin, *supra* note 8, at 1749.

133. Slobogin, *supra* note 39, at 657; Peter J. Galie, *State Constitutional Guarantees and the Alaska Supreme Court: Criminal Procedure Rights and the New Federalism 1960-1981*, 18 GONZ. L. REV. 221 (1982-83); DONALD E. WILKES JR., *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 166 (1985); Johansen, *supra* note 95, at 297.

In *People v. Brisendine*,[134] the California Supreme Court addressed the scope of the right to be free from unreasonable searches and seizures.[135] Two years earlier, the United States Supreme Court had determined that police officers may, in a search incident to arrest, look inside containers incapable of holding a weapon—specifically, a crumpled cigarette package found in the defendant's shirt pocket.[136] Finding no Fourth Amendment violation, the United States Supreme Court held that the trial court could admit the seized evidence at the defendant's trial.[137] The California Supreme Court declined to follow the United States Supreme Court holding, and determined that while an officer may conduct a search for weapons, no reason exists to search the contents of containers incapable of holding weapons, such as an opaque colored bottle and envelopes.[138] To support its conclusion, the California Supreme Court discussed how the independent nature of the state constitution allowed the court to reach a conclusion different from that of the United States Supreme Court.[139] Justice Mosk summarized the history of the early bills of rights of the states, and explained that only the state constitution offered protection from the abuses of local officials.[140] Writing for the four to three majority, Justice Mosk justified the court's ability to impose higher standards on searches and seizures under the California Constitution. He cited section 24 of article one, which states: "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution. This declaration of rights may not be construed to impair or deny others retained by the people."[141] Justice Mosk also relied on *People v. Superior Court (Simon)*,[142] a California case decided before the United States Supreme Court had ruled on the issue. In *Simon*, the California Supreme Court determined that when a defendant is cited for an offense which typically has neither "instrumentalities" or "fruits," a search is not justified unless there are facts which lead an officer to believe the defendant is armed.[143] However, *Simon* was not expressly based on the California Constitution. Rather, in

134. 531 P.2d 1099 (Cal. 1975).
135. *Id.* at 1105-15.
136. United States v. Robinson, 414 U.S. 218, 236 (1973).
137. *Id.*
138. *Brisendine*, 531 P.2d at 1109.
139. *Id.* at 1112.
140. *Id.* at 1113.
141. *Id.* at 1114.
142. 496 P.2d 1205 (Cal. 1972).
143. *Id.* at 1217.

Simon the court relied on both federal and state law.[144] Therefore, although Justice Mosk implied that the court could go beyond the federal minimum, simply asserting this right alone did not further the legitimacy of the doctrine of independent state grounds, especially when the doctrine had yet to become a routine and accepted practice.

The *Brisendine* court missed a unique opportunity to persuade Californians not only that the independent state grounds doctrine is valid, but also that California case law mandates a result different from the federal rule. Moreover, the court declined to state any principles or rules by which one could determine when the California Constitution would mandate a result contrary to federal interpretations of similar language.

The California Supreme Court should have explained that prior California cases relying on federal precedent implicitly made that precedent a part of the state's law, and that the California Constitution required the court to maintain the prior, more stringent standards. The court also should have stated that, in the future, when an issue of constitutional law arose, the court would first look to what the California constitutional, statutory, and case law required. Of course, this tactic may have been more successful had the California Supreme Court been applying the doctrine routinely and consistently throughout the days of incorporation and during the Warren Court era, and if when adopting federal decisions, the court adopted them as part of California state law.

Former Oregon Supreme Court Justice Hans Linde's approach is more persuasive and more deferential to state constitutional independence. Under this approach, state courts first look to their own constitutions and how the courts of their state have interpreted the language of the state constitution. Unless this interpretation violates the Federal Constitution, the state court's inquiry should end.[145]

The court later missed another opportunity to delineate standards for the application of the doctrine of independent state grounds. In *People v. Disbrow*,[146] the court held that statements obtained by the police in violation of *Miranda v. Arizona*[147] could not be admitted for the purpose of impeaching the defendant on cross-examination.[148] The United States Supreme Court had previously held that such state-

144. *Id.* at 1216-21.
145. Linde, *supra* note 88, at 387.
146. 545 P.2d 272 (Cal. 1976).
147. 384 U.S. 436 (1966).
148. *Disbrow*, 545 P.2d at 392.

ments were admissible to impeach the defendant in *Harris v. New York*.[149] The California Supreme Court was once again in the awkward position of disagreeing with the United States Supreme Court, as well as having to overrule itself.[150] The court extensively analyzed case law before *Harris* as well as *Harris* itself and concluded that it disagreed with its rule.[151] The court then pointed to other courts which refused to adopt the *Harris* rule.[152] Finally, the court stated "[w]e pause finally to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the Federal Constitution."[153]

Once again, the mere recitation of its power to interpret the California Constitution independently did little to promote the acceptance and legitimacy of the doctrine of independent state grounds. The opinion would have been more persuasive if the court had detailed the significance of the doctrine of independent state grounds and stated why California case law mandated the result reached. The court should have enunciated a standard for analyzing issues under the California, rather than the Federal, Constitution.

It is unfortunate that the California Supreme Court was insensitive to the need to persuade the people of California of the importance of maintaining the integrity and independence of the California Constitution. Even early on, the voters indicated their disagreement with the court when they effectively overturned the court's interpretation in *People v. Anderson*[154] of California's protection against "cruel or unusual punishment."[155] The court should have taken this as a signal that it had to be more persuasive, and even take on an educational role, explaining the importance of the state's constitution and the particular rights which it interpreted.

C. Criticisms of the Doctrine in California

Had the California Supreme Court been more consistent and persuasive in its application of the doctrine, perhaps we would not now

149. 401 U.S. 222 (1971).

150. In People v. Nudd, 524 P.2d 844 (Cal. 1974), by a 4-3 vote, the court had followed the *Harris* rule.

151. *Disbrow*, 545 P.2d at 280.

152. *Id.*

153. *Id.*

154. 493 P.2d 880 (Cal. 1972).

155. CAL. CONST. art. I, § 17.

be faced with the present conflict between the right of the voters to change the constitution and the doctrine of independent state grounds. However, some critics argue that where the language of the California and Federal Constitution is nearly identical, the doctrine only applies when circumstances peculiar to California exist to justify a different result.[156] It follows from this that an application of the doctrine consistent with state precedent would be irrelevant and that state courts should follow federal precedent even where this would require overturning state precedent. As far back as 1938, the California Supreme Court in *Gabrielli v. Knickerbocker*,[157] stated that:

> [s]tate courts in interpreting provisions of the state constitution are not necessarily concluded by an interpretation placed on similar provisions in the federal constitution . . . But . . . *cogent reasons must exist before a state court* in construing a provision of the state constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal constitution.[158]

In *Gabrielli*, the court determined that the requirement that all school students salute the United States flag was not a violation of the student's guarantee of freedom of religion.[159] Without providing much state law analysis, the court concluded that since the United States Supreme Court refused to grant certiorari in two similar cases, the Supreme Court did not find a constitutional violation.

Although critics of the California Supreme Court's use of the doctrine of independent state grounds might rely upon *Gabrielli*, it is of little analytical value; the court in *Gabrielli* did not provide any meaningful guidance as to the parameters of the doctrine of independent state grounds. The criticism rests on the notion that the California Constitution is independent only if it is in some way different or "peculiar" from the United States Constitution. It ignores the signifi-

156. George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor - Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 988, n.91 (1979); John K. Van de Kamp and Richard W. Gerry, *Reforming the Exclusionary Rule: An Analysis of Two Proposed Amendments to the California Constitution*, 33 HASTINGS L.J. 1109, 1117 (1982); *see also* People v. Disbrow, 545 P.2d 272, 283-84 (Cal. 1976) (Richardson, J., dissenting); People v. Brisendine, 531 P.2d 1099, 1116-17 (Cal. 1975) (Burke, J., dissenting).

157. 82 P.2d 391 (Cal. 1938).

158. *Id.* at 392-93 (emphasis added); *see also* People v. Norman, 538 P.2d 237, 246 (Cal. 1975) (Clark, J., dissenting) ("unless conditions peculiar to California support a different meaning," California courts should follow federal precedent).

159. *Id.* at 392. The California constitutional counterpart to the Federal Religion Clause reads: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The Legislature shall make no law respecting an establishment of religion." CAL. CONST. art. I, § 4.

cance of section 24 of article I which declares the independence of the state declaration of rights. However, if constitutional independence is to rest on some state peculiarity, California courts could justify a broader application of the exclusionary rule in cases like *Disbrow* and *Brisendine* by referring to the right to privacy expressly provided for in the California Constitution.[160] Other states have relied on an express constitutional privacy right as the basis for expanded rights.[161] Although the California Supreme Court has been reluctant to rely on this right with respect to criminal rights,[162] this express provision could, as a circumstance peculiar to California, justify broader rights.[163] The court would not have to define explicitly the rights to be free from unreasonable searches and seizures and against self-incrimination in terms of privacy. Rather, the court could, after discussing California case law interpreting these rights, point to the express right of privacy to justify broader protections in the areas of searches and seizures and self-incrimination.

Another criticism of the doctrine is that, having already adopted federal standards, state courts are in some way bound to future decisions interpreting the same constitutional provision.[164] This argument ignores the proper effect of the federal standards in state laws. For instance, when a court adopts a case from another jurisdiction, that court is not then bound by *subsequent* cases decided by the other jurisdiction which may alter the original decision. This subsequent case law is merely persuasive.[165]

160. "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*." CAL. CONST. art. I, § 1 (emphasis added).

161. *See* State v. Solis, 693 P.2d 518 (Mont. 1984) (relying on art. II § 10 of the Montana Constitution and holding that there is a reasonable expectation of privacy as to face to face conversations and government recordings will not be admitted at trial, even where one party has consented to the recording; *c.f.* United States v. Caceres, 440 U.S. 741 (1979)); State v. Jones, 706 P.2d 317 (Alaska. 1985) (relying on art. I § 22 of the Alaska Constitution and holding that the Illinois v. Gates, 462 U.S. 213 (1983) "totality of the circumstances" test for reviewing an affidavit for a warrant does not adequately protect state constitutional rights to privacy against unreasonable searches and seizures).

162. *Cf.* People v. Williams, 128 Cal.App.3d. 981, 985 (1982) (noting that the California Supreme Court has not explained the relationship between the constitutional right of privacy and the right to be free from unreasonable seizures and searches); Lewis A. Kornhauser, Comment, *Privacy: The New Constitutional Language and the Old Right, The Supreme Court of California 1974-1975*, 64 CAL. L. REV. 347, 356-61 (1976).

163. *See supra* notes 4-5 and accompanying text.

164. *See supra* note 156.

165. *See, e.g.*, HARRY W. JONES ET.AL., LEGAL METHOD 5-8 (2d ed. 1980).

III. The Voter Initiative

A. The History

In 1913, former President and United States Supreme Court Justice William Taft predicted that "the movement [to direct democracy] will come to an end by the non-use of the referendum, as the people shall see the absurdities into which it is likely to lead them."[166] Contrary to Taft's prediction, twenty-three states now allow the use of the initiative and referendum.[167] Since 1898, there have been more than 17,000 propositions placed on state ballots.[168] Although the use of this direct democracy has gone through periods of little or no use, it has become immensely popular.[169]

The progressive reformers of the first two decades of this century promoted the use of the initiative and referendum as tools to advance direct democracy.[170] The reforms advocated by the progressives were intended to "[g]ive the government back to the people"[171] due to the growing distrust of political organizations. The initiative, referendum, recall, and direct primary were intended to infuse representative government with a degree of direct democracy.[172] At the core of these reforms was the belief that citizen involvement in government would improve government and limit the power of special interests.[173]

The Progressive Movement came to California in 1908.[174] The 1879 California Constitution already required public ratification of constitutional amendments as well as referral of certain topics to the voters.[175] The "Progressives" in California, a faction of the California Republican party, sought to achieve greater voter influence and control in an effort to limit the power of special interest groups and re-

166. WILLIAM H. TAFT, POPULAR GOVERNMENT 71 (1913).

167. DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 40 (1989).

168. DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING OF BALLOT PROPOSITIONS IN THE UNITED STATES 70 (1984).

169. SCHMIDT, *supra* note 167, at 15-23; MAGLEBY, *supra* note 168, at 5.

170. MAGLEBY, *supra* note 168, at 20; WINSTON W. CROUCH ET AL., CALIFORNIA GOVERNMENT AND POLITICS 93 (3d ed. 1964).

171. MAGLEBY, *supra* note 168, at 21.

172. *Id.*

173. *Id.* at 22. However, Magleby also questions the true motivation behind the Progressive movement. *Id.* at 24-25 (citing RICHARD HOFSTADER, THE AGE OF REFORM 131-73 (1955) (suggesting that many Progressives were middle-class, urban, well educated, and often self-employed businesspeople, and that the reforms sought were merely a way to increase *their* influence on public policy)).

174. CROUCH, *supra* note 170, at 93.

175. *Id.* at 94.

duce corruption by political machines.[176] More specifically, popular disgust with Boss Herren and the Southern Pacific political machine fueled the spark for reform.[177] After successfully prosecuting Abraham Ruef, a San Francisco political boss, Hiram W. Johnson was elected Governor of California.[178] Johnson promoted the successful adoption of progressive reforms in California, including the voter initiative.

B. The Process

In California, an individual or a group may draft amendments to the state constitution or statutory law.[179] After drafting a proposed amendment, the proponents submit it to the Attorney General who prepares a title and a summary of the measure and certifies the initiative.[180] The proponents then have 150 days to gather a number of signatures, based on a percentage of the electoral votes cast in the most recent gubernatorial election.[181] To place a statutory change on the ballot requires five percent of the vote,[182] while a constitutional amendment requires eight percent.[183] Once on the ballot, the initiative will be adopted if a simple majority of the voters voting on the specific initiative opt to accept it.[184] There are a few restrictions on proposals. First, "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect."[185] Further, the California Supreme Court has interpreted the California Constitution to require that all of a proposition's parts be "reasonably germane."[186] Second, an initiative to amend the constitution will not be effective if it amounts to a *revision* of the constitution.[187] Finally,

176. Eugene C. Lee, *California, in* REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY 87, 88-89 (David Butler & Austin Ranney eds., 1978).

177. CROUCH, *supra* note 170, at 94.

178. *Id.* at 54.

179. The California Constitution allows individuals to submit statutory changes to the voters as well. CAL. CONST. art. II, § 8. However, the focus here is on constitutional amendments by initiative.

180. *Id.*

181. CAL. ELEC. CODE § 3513 (West 1977).

182. CAL. CONST. art. II, § 8(b).

183. *Id.*

184. For a description of requirements in other states, see MAGLEBY, *supra* note 168, at 38-40, tbl. 3.1.

185. CAL. CONST. art. II, § 8(d).

186. Perry v. Jordan, 207 P.2d 47, 50 (Cal. 1949); Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1290 (Cal. 1978).

187. McFadden v. Jordan, 196 P.2d 787, 789 (Cal. 1948). For more discussion of this limitation, see *infra* text accompanying notes 258-74.

constitutional amendments must not violate the United States Constitution.[188]

C. The Problems

From 1911, when the initiative was enacted in California, to 1988, 179 initiatives were placed on the statewide ballot.[189] One hundred and three of those initiatives proposed constitutional amendments.[190] Californians have clearly taken advantage of their right to participate in the government of their state, and studies indicate that the initiative has reduced voter apathy and increased political awareness and participation.[191] Nonetheless, the voter initiative is not a political panacea and it has drawn recurrent criticism. While some of these criticisms are interrelated, this Article focuses primarily on those relevant to the thesis, although other criticisms are considered briefly.

The first criticism of the voter initiative states that a substantial number of people eligible to vote are unable to comprehend the numerous and complex initiatives on which they must make a decision.[192] Most propositions require that readers have the reading level of a third-year college student.[193] Even if a voter has the level of education necessary to understand the initiatives, it is unlikely that the voter is able to devote the amount of time necessary to understand the proposed initiatives. Unlike elected representatives, whose full-time employment includes analyzing proposed legislation, members of the electorate may find it difficult to devote much time to examining the voter handbook containing the proposed new law.[194]

Another criticism is that not all eligible voters vote on initiatives; thus, those who do vote effectively represent everyone else. Due to low voter turnout, the initiative process effectively becomes representative government, and representative government is precisely what direct democracy seeks to avoid. The problem is that the initiative

188. *See* Reitman v. Mulkey, 387 U.S. 369 (1967); *see also* Gordon E. Baker, *American Conceptions of Direct Vis-a-Vis Representative Governance*, 5 CLAREMONT J. PUB. AFF. 9-10 (1977); James J. Seeley, *The Public Referendum and Minority Group Legislation: Postscript to* Reitman v. Mulkey, 55 CORNELL L. REV. 881, 890 (1970).

189. PHILIP L. DUBOIS AND FLOYD F. FEENEY, IMPROVING THE CALIFORNIA INITIATIVE PROCESS: OPTIONS FOR CHANGE 16-17, tbl. 3 (1992).

190. *Id.*

191. MAGLEBY, *supra* note 168, at 13-14.

192. *Id.* at 138-39.

193. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1509 (1990).

194. DAVID BUTLER & AUSTIN RANNEY, *Theory, in* REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY 34 (1978).

process does not possess the same checks as representative government. The legislative process provides the opportunity to deliberate, debate, revise, and compromise before representatives vote on the final version of a bill. To enact a change in California statutory law, a bill must obtain a majority vote from each house.[195] Amending the California Constitution requires a two-thirds vote from each house before the proposal goes before the voters; the constitutional amendment becomes law only if it receives a majority vote at the polls.[196]

By contrast, the initiative process circumvents the "deliberate and debate" stage. Once the Attorney General has certified a measure, there may be only limited changes to the language of the initiative,[197] permitting few compromises and requiring the voters to accept or reject the measure as presented. Passage of an initiative requires only a majority vote, regardless of whether the measure proposes statutory or constitutional changes.[198]

Another problem with the initiative is that it no longer serves one of its original purposes. The initiative process as originally conceived was meant to avoid the domination of the legislature by powerful interest groups.[199] Today, however, interest groups dominate the initiative process.[200]

A final and most significant criticism is that constitutional change by voter initiative allows for unchecked "majority tyranny." As discussed, declarations of rights protect fundamental rights from state intrusion. The initiative process endangers those rights, however, by raising the possibility that popular will may restrict unpopular rights. This is especially true with respect to rights thought of as belonging only to criminal defendants. Because these rights are especially susceptible to popular passions and fears, it is even more important to insulate them from voter whim. While voters should have the opportunity to change the constitution, this right should be somewhat restricted in order to preserve the fundamental rights of all Californians.[201]

195. CAL. CONST. art. IV, § 8(b).

196. CAL. CONST. art. XVIII, § 1.

197. CAL. ELEC. CODE §§ 3505 (West Supp. 1993).

198. CAL. ELEC. CODE § 54 (West 1977)

199. Lee, *supra* note 176, at 88-89.

200. JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE 103 (1989).

201. Unfortunately, the popular perspective tends to be one of outrage when a defendant "gets off on a technicality." The "technicality," however, is often that the state has in some way violated the defendant's rights. For example, the police may have conducted an illegal search of the defendant's home. In such a situation the exclusionary rule operates to

The major criticisms of the initiative do not address the need for preserving the independence of the California Constitution. While the majority may vote to curtail unpopular rights, they may do so only to the extent that such changes do not fall below the level of protection provided for in the Federal Constitution. If voters continue to adopt "forced linkage" of federal interpretation of federal rights, the California Declaration of Rights will be superfluous.

IV. Propositions 8 and 115 - Voter Backlash

A. The Backlash

During the "New Federalism" period, the California Supreme Court consistently declined opportunities to bolster the legitimacy of the doctrine of independent state grounds and further declined to emphasize that the California Constitution mandates results independent of United States Supreme Court decisions.[202] This mistake spurred a voter revolt.

1. Proposition 8

In June of 1982, the California voters passed Proposition 8, the self-proclaimed "Victims' Bill of Rights." While this initiative effected several changes to the California Constitution and statutory scheme,[203] the focus here is on section 28(d), added to the constitution's Declaration of Rights. In particular, the "Right to Truth-in-Evidence"[204] section provides that "relevant evidence shall not be excluded in any criminal proceeding."[205]

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exclude the admission of any evidence which was obtained pursuant to the violation of the right to be free from "unreasonable searches and seizures."

202. *See supra* notes 132-55 and accompanying text.

203. *See supra* note 13.

204. CAL. CONST. art. I, § 28(d).

205. *Id.* The full section states:

> Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

CAL. CONST. art. I, § 28(d). For discussions on the practical impact of section 28(d) on California evidence law, see Hank M. Goldberg, *The Impact of Proposition 8 on Prior Misconduct Impeachment Evidence in California Criminal Cases*, 24 LOY. L.A. L. REV. 621 (1991); Mark Dyer Klein & Randall A. Cohen, Comment, *Proposition 8: California Law After In re Lance W. and People v. Castro*, 12 PEPP. L. REV. 1059 (1985).

After the measure survived constitutional challenges,[206] and was held to apply only to crimes committed on or after its effective date,[207] the California Supreme Court was forced to reexamine its use of independent state grounds with respect to the exclusionary rule. In the following two cases, the state's highest court interpreted the section overbroadly in order to achieve the result the voters presumably wanted. While it is important to ascertain the intent of a drafting body such as the legislature, courts should recognize the differences between law that comes from the legislature and that which comes from the voters. As discussed, the processes of enacting law by voter initiative and that of legislative law-making are very different.[208] Emphasizing the intent of the voters is particularly troubling. Where an initiative alters fundamental rights, courts should be especially wary of relying on ambiguous voter intent to justify unnecessarily broad interpretations of the initiative.

In *In re Lance W.*,[209] the court addressed whether the vicarious exclusionary rule established in *People v. Martin*[210] survived section 28(d). In a four to three decision, the court held it did not. In *Lance W.*, the court determined that the intent of the voters was to "eliminate a judicially created *remedy* for violations of search and seizure provisions of the federal or state Constitutions, . . . except to the extent that exclusion remains federally compelled."[211]

The majority held that the voters had expressed their intent that the "exclusion of evidence is not an acceptable means of implementing [the right to be free from unreasonable seizures and searches], except as required by the Constitution of the United States,"[212] and that section 28(d) "abrogated both the vicarious exclusionary rule . . . and a defendant's right to object to and suppress evidence seized in violation of the California, but not the Federal, Constitution."[213]

Conspicuously absent in section 28(d) is any mention of the doctrine of independent state grounds, or of the Federal Constitution. The official legislative analyst merely states that "[t]his measure generally would allow most relevant evidence to be presented in criminal cases . . . . The measure could not affect *federal* restrictions on the use

206. Brosnahan v. Brown, 651 P.2d 274 (Cal. 1982).
207. People v. Smith, 667 P.2d 149, 151-52 (Cal. 1983).
208. *See supra* notes 192-200 and accompanying text.
209. 694 P.2d 744 (Cal. 1985).
210. 290 P.2d 855 (Cal. 1955).
211. *Lance W.*, 694 P.2d at 752.
212. *Id.*
213. *Id.* at 747.

of evidence."[214] The court held that section 28(d) had not implicitly repealed two clauses of the Declaration of Rights, one which states that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution,"[215] and another protecting against unreasonable searches and seizures.[216] Instead, the court concluded that the rights stated in sections 13 and 24 still existed, but Proposition 8 eliminated the remedy of excluding illegally obtained evidence.[217] This contradicts the conclusion in *People v. Cahan*[218] that the exclusion of illegally obtained evidence is the *only* effective remedy.[219]

The other significant "Right to Truth-in-Evidence" decision is *People v. May*.[220] In *May*, the issue was whether the rule in *People v. Disbrow*,[221] barring the admission of statements for impeachment purposes that were obtained in violation of *Miranda v. Arizona*,[222] survived Proposition 8. The court concluded that, indeed, *Disbrow* had been abrogated.[223] The decision turned on the interpretation of the savings clause of section 28(d). Section 28(d) states in pertinent part, "[n]othing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay . . . ."[224]

In his dissent, Justice Mosk argued the rule in *Disbrow* constituted an "existing statutory rule relating to evidence."[225] Justice Mosk based this on the California Evidence Code, which defines a privilege pursuant to the California and Federal Constitutions.[226] Justice Mosk contended that in *Disbrow*, the court did not simply provide a *remedy* for illegally obtained statements. Rather, the court in *Disbrow* declared that "the privilege against self-incrimination . . . precludes *use* by the prosecution of any extrajudicial statement by the defendant . . . *either* as affirmative evidence or for the purposes of impeachment, obtained during custodial interrogation in violation of the standards declared in *Miranda* and its California progeny."[227] This statement by

214. SECRETARY OF STATE, *supra* note 16, at 32.
215. CAL. CONST. art. I, § 24.
216. CAL. CONST., art. I, § 13.
217. *Lance W.*, 694 P.2d at 756.
218. 282 P.2d 905 (Cal. 1955).
219. *Id.* at 913.
220. 748 P.2d 307 (Cal. 1988).
221. 545 P.2d 272 (Cal. 1976).
222. 384 U.S. 436 (1966).
223. *May*, 748 P.2d at 312-13.
224. CAL. CONST. art. I, § 28(d).
225. *May*, 748 P.2d at 314-18 (Mosk, J., dissenting).
226. *Id.*
227. *Id.* at 314 (emphasis added) (citations omitted).

the *Disbrow* court interprets the California Constitution as protecting Californians from the *use* of illegally obtained statements. That is, when the state uses such statements in a trial against the defendant, the defendant's right against self-incrimination is violated. Thus, the rule in *Disbrow* did not simply provide a remedy for the initial violation of the privilege when the police illegally obtain a statement. Rather, *Disbrow* articulated the *extent* of the privilege itself.

Nonetheless, relying extensively on the court of appeal's opinion, a majority of the California Supreme Court determined that the rule in *Disbrow* did not purport to "define the scope of the California constitutional privilege against self-incrimination now set forth in article I, section 15."[228] Rather, the court stated, "[i]n *Disbrow*, . . . the court created a new remedy for violations of *Miranda*, but did not reinterpret or extend the scope of the substantive rights protected by the Constitution."[229] Essentially, the court concluded that the *Disbrow* rule was not mandated by the California Constitution, and was therefore merely a judicially-created remedy. Refusing to read section 28(d) narrowly, the California Supreme Court relied on the presumed intent of the voters. The court determined that the "*probable* aim of the voters in adopting section 28(d) . . . [was] to dispense with exclusionary rules derived solely from the state Constitution. . . ."[230] The court also stated that "it *seems very likely* that Proposition 8 was crafted for the very purpose . . . of abrogating cases such as *Disbrow* . . . ."[231] Furthermore, "the voters *probably* intended to preserve *legislatively* created evidentiary rules."[232] Despite apparent uncertainty, the California Supreme Court adhered to the presumed intent of the voters.

Proposition 8 claimed to have the support of prosecutors and other law enforcement officials, and it is likely that these groups did intend to overturn rulings such as *Disbrow*.[233] Nevertheless, the court's uncertainty regarding *voter* intent, coupled with the broad and ambiguous language of section 28(d), should have caused the court to hesitate in restricting rights such as the privilege against self-incrimination.

While the court's decisions in *May* and *Lance W.* deserve criticism, the political pressures on the California Supreme Court must be

228. *Id.* at 311.
229. *Id.*
230. *Id.* at 312 (emphasis added).
231. *Id.* (emphasis added).
232. *Id.* at 313 (emphasis added).
233. SECRETARY OF STATE, *supra* note 16, at 35.

considered. In 1986, the voters elected to recall three of the court's justices, including Chief Justice Rose Bird.[234] The public was outraged by the court's overturning death convictions or sentences on what appeared to be "technical" grounds. The voters sent a message to the justices to change their ways, or else. The justices must have interpreted the "Right to Truth-in-Evidence" provision's silence on the doctrine of independent state grounds and the vagueness of voter intent in light of this political climate.

Following *Lance W.* and *May*, California courts have used overly broad interpretations of section 28(d).[235] This has resulted in a chipping away of the California Constitution's independence in other areas of criminal procedure law. In *People v. Epps*,[236] the appellate court determined that California courts must follow federal precedent not only when the suppression of evidence is involved, but also when dismissing charges against the defendant is the "remedy." In *Epps*, the state failed to properly preserve physical evidence which was important to the defendant's position. The court determined that Proposition 8 applied to this situation—despite the fact that admissibility of evidence was not an issue. The court reasoned that "where the evidence allegedly lost or destroyed is potentially exculpatory, and the usual remedy is exclusion of evidence potentially inculpatory, the functional remedial equivalent of exclusion of evidence is dismissal . . . ."[237] Thus, where a defendant's right to "access to evidence"[238] has been violated and the court would have to dismiss the case under the California Constitution, pursuant to section 28(d), the court must not dismiss unless necessary under the Federal Constitution. Section 28(d) says nothing about dismissals, and only addresses the admissibility of evidence.

234. *See* Eule, *supra* note 193, at 1581-82; *see also* Gerald F. Uelman, *Supreme Court Retention Elections in California*, 28 SANTA CLARA L. REV. 333 (1988).

235. *See* People v. Johnson, 767 P.2d 1047, 1065-66 (Cal. 1989) (regarding exclusion of evidence tests when demonstrative evidence is lost or destroyed); *see also* People v. Valencia, 218 Cal. App. 3d 808, 816-19 (1990); People v. Lopez, 198 Cal. App. 3d 135, 142-44 (1988) (regarding defendant's right to compulsory process to secure the testimony of defense witnesses). In all of these cases, the courts concluded that Section 28(d) required the state courts to adhere to federal precedent.

236. 182 Cal. App. 3d 1102 (1986).

237. *Id.* at 1115.

238. California v. Trombetta, 467 U.S. 479, 485 (1984).

2. Proposition 115

In an attempt to require the California courts to further adhere to federal precedent with respect to nearly all constitutional issues, the voters passed Proposition 115 on June 5, 1990.

Similar to the court's broad interpretation of Proposition 8, the California Supreme Court has also given great deference to the voter's presumed intent in approving Proposition 115. Although the court held one section of Proposition 115 constituted an invalid *revision* of the constitution,[239] the court has broadly interpreted other constitutional changes made by Proposition 115. For example, section 30(c) establishes reciprocal discovery in criminal cases, stating: "[i]n order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature . . . ."[240]

Prior California case law had established that "[t]he People must 'shoulder the entire load' of their burden of proof in their case in chief, without assistance either from the defendant's silence or from his compelled testimony."[241] Federal precedents interpreting the federal privilege against self-incrimination rest on the rationale that the privilege "'is a *personal* privilege: it adheres basically to the person, not to the information that may incriminate him.'"[242] In contrast, the California Supreme Court has relied on the policy of requiring the prosecution to "'investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources.'"[243] Although initially the California Supreme Court had looked to federal precedent[244] in interpreting the guarantee,[245] the court later stated

239. Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990); *see infra* text accompanying notes 258-76, 296.

240. CAL. CONST. art. I, § 30(c).

241. In re Misener, 698 P.2d 637, 640 (Cal. 1985) (quoting Prudhomme v. Superior Court, 466 P.2d 673, 676 (Cal. 1970)).

242. United States v. Nobles, 422 U.S. 225, 233 (1975) (quoting Couch v. United States, 409 U.S. 322, 327 (1973)) (holding that statements made by persons other than the defendant are outside the scope of the self-incrimination clause).

243. *Misener*, 698 P.2d at 646 (quoting Williams v. Florida, 399 U.S. 78, 112 (1970) (Black, J., concurring and dissenting)).

244. In Prudhomme v. Superior Court, 466 P.2d 673 (Cal. 1970), the court examined the federal trend of broadening the rights against self-incrimination. The *Prudhomme* court noted Griffin v. California, 380 U.S. 609 (1965), in which the Supreme Court held that the Federal Constitution forbid the trial court and the prosecution from commenting on the defendant's failure to testify, or upon a defendant's reliance on the privilege against self-incrimination. Another case discussed as part of this trend was Miranda v. Arizona, 384 U.S. 436 (1966), which broadened the accusatory stage to which the privilege applies. Also mentioned was Malloy v. Hogan, 378 U.S. 1 (1964), which applied the federal guarantee against self-incrimination to the states through the Due Process Clause of the Fourteenth Amendment. The court in *Prudhomme* noted that the United States Supreme Court had

that "*Prudhomme* [*v. Superior Court*] put this court on record as being considerably more solicitous of the privilege against self-incrimination than federal law currently requires."[246] In *Allen v. Superior Court*,[247] the court had acknowledged that the federal standard was inconsistent with the California court's interpretation of the privilege. The court "affirm[ed] the continued vitality of the stringent standards set forth in *Prudhomme* for the protection of the privilege against self-incrimination as embodied in article I, section 15."[248]

In *Izazaga v. Superior Court*,[249] however, the supreme court confronted the question of whether prior case law regarding both reciprocal discovery and California's protection against self-incrimination survived section 30(c). The court noted that "the California Constitution continues to afford criminal defendants an independent source of protection from infringement of certain rights, including the privilege against self-incrimination,"[250] but went on to hold that section 30(c) "constitutes a specific exception to the broad privilege against self-incrimination set forth in article I, section 15."[251] Section 30(c) says nothing about the privilege against self-incrimination, however, nor do the statutory changes relating to reciprocal discovery enacted by Proposition 115.[252] As to section 30(c) specifically, the legislative analyst stated that "[t]his measure . . . [c]hanges the rule under which prosecutors and defense attorneys must reveal information to each other in their prospective criminal cases [and] [r]epeals the requirement that a copy of the arrest report be delivered to the defendant at the initial court appearance, or within two days of the appearance."[253] This does not explain how the proposition changes criminal discovery rules. Furthermore, this analysis could be interpreted as explaining that the only rule changed is the rule regarding delivery of the arrest report to the defendant. Thus, despite the fact that section 30(c) is silent as to its effect on the privilege against self-incrimination, the

recently granted certiorari in Williams v. Florida, 224 So. 2d 406 (Fla. 1969) (holding that Florida's alibi statute did not violate the Fifth Amendment). The Court in *Williams* ultimately held that the statute did not violate the Fifth Amendment. Williams v. Florida, 399 U.S. 78 (1970).

245. U.S. CONST. amend. V.

246. Reynolds v. Superior Court, 528 P.2d 45, 50 (Cal. 1974).

247. 557 P.2d 65 (Cal. 1976).

248. *Id.* at 67.

249. 815 P.2d 304 (Cal. 1991).

250. *Id.* at 314.

251. *Id.*

252. *See* CAL. PENAL CODE §§ 1054-1054.7 (West Supp. 1993).

253. SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION 33 (1990).

court adopted a rule of construction which allows implicit, albeit partial, repeal of California's privilege against self-incrimination. A majority of the court determined that section 30(c) was a specific exception to the privilege against self-incrimination, allowing reciprocal discovery to the extent federal precedent allows it.[254]

The court's interpretation of section 30(c), however, made the attempted change to section 24 redundant.[255] Justice Mosk dissented from the court's broad interpretation of section 30(c) despite the failure of the proposed amendment to section 24. He argued that section 30(c) could not restrict a defendant's privilege against self-incrimination as interpreted in *Prudhomme* unless the voters had effectively forced California courts to follow federal interpretations of the federal right against self-incrimination which he concluded they had not done.[256] The court once again deferred to the presumed will of the voters, and interpreted the proposition to link California self-incrimination law to federal precedent.[257]

B. Amendment or Revision?

The California Supreme Court has not only broadly interpreted specific provisions of initiatives in an attempt to further the presumed will of the voters, but has also loosely applied the two principal restrictions on the use of the initiative, the "no revision rule" and the "single-subject rule."[258] As a result, initiatives can easily overcome substantive restrictions and can be broadly interpreted even if they restrict or conflict with pre-existing rights.

According to the California Constitution, while the voters may *amend* the constitution, they may not *revise* it.[259] The distinction be-

254. *Izazaga*, 815 P.2d at 313-14.

255. *See id.* at 333 (Mosk, J., dissenting).

256. *Id.* at 332 for a discussion of the proposed change to Art. I, § 24, *see infra* text accompanying notes 258-74, 296.

257. *See id.* at 314, 314 n.9.

258. The single-subject rule is that "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect." CAL. CONST. art. II, § 8(d). For a more detailed discussion of the single-subject rule, see Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1983) (arguing for the continued use of the "reasonably germane" standard). *But see* Steven W. Ray, Comment, *The California Initiative Process: The Demise of the Single-Subject Rule*, 14 PAC. L.J. 1095 (1983) (arguing for a stricter interpretation of the single-subject rule).

259. "The electors may *amend* the Constitution by initiative." CAL. CONST. art. XVIII, § 3 (emphasis added). "[A] revision of the constitution may be accomplished only by convening a constitutional convention and obtaining popular ratification, or by legislative submission of the measure to the voters." Raven v. Deukmejian, 801 P.2d 1077, 1085 (Cal. 1990) (interpreting CAL. CONST. art. XVIII, §§ 1-2).

tween an *amendment* and a *revision* is quite gray, and the constitution does not define these terms. A court faces the dilemma of either applying the "no revision rule" strictly and facing accusations of frustrating voter will, or applying the restriction loosely but having to reconcile an initiative with conflicting provisions in California's Declaration of Rights.[260] This quandary underscores the need for a supermajority vote in order to enact any initiative altering the Declaration of Rights. Where seventy-five percent of the voters approve of a change to the Declaration of Rights, the issue of revision or amendment may no longer be relevant.

To its credit, the California Supreme Court, in *Raven v. Deukmejian*, invalidated a section of Proposition 115 which would have abolished the doctrine of independent state grounds with respect to at least thirty-two constitutional rights.[261] One section of Proposition 115 added the following language to the California provision: "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[262] The provision continued:

> In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel or unusual punishment, *shall be construed by the courts of this state in a manner consistent with the Constitution of the United States.* This Constitution shall not be construed by the courts to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.[263]

Despite the fact that this proposition passed in the special election, the California Supreme Court held that it would not be enforced because it constituted a *revision* of the constitution,[264] which may only be accomplished by a constitutional convention[265] or by legislative submission of the measure to the voters.[266] The California Supreme

260. *See infra* notes 261-74, 296 and accompanying text.
261. *Raven*, 801 P.2d at 1089.
262. CAL. CONST. art. I, § 24.
263. *Id.* (emphasis added).
264. *Raven*, 801 P.2d at 1089.
265. CAL. CONST. art. XVIII, § 2.
266. CAL. CONST. art. XVIII, § 1.

Court looked to rules established in prior case law to determine whether this section constituted a revision or an amendment.

In *McFadden v. Jordan*,[267] the court invalidated as a revision a purported constitutional amendment. The measure in *McFadden* was called the "California Bill of Rights," and contained 12 separate sections, 208 subsections and more than 21,000 words.[268] Furthermore, the measure included sections covering subjects such as a pension commission, wagering and gaming, oleomargarine, healing arts, civic centers, and surface mining.[269] The court held that the title of the initiative created "a misleading and confusing conflict in terminology of titles and related subject matter . . ." with California's Declaration of Rights.[270] The court found that "at least 15 of the 25 articles contained in our present Constitution would be repealed either in their entirety or substantially altered by the measure, a minimum of four . . . new topics would be treated, and the functions of both the legislative and the judicial branches of our state government would be substantially curtailed."[271] In holding that the initiative constituted an invalid revision of the constitution, the court determined that, given the multifarious and far-reaching provisions in that particular initiative, it was unnecessary to "undertake to define with nicety the line of demarcation" between an amendment and a revision.[272] Instead, the court stated that "[e]ach situation . . . must, we think, be resolved upon its own facts."[273]

In *Raven*, the section in dispute only changed the independent nature of the California Constitution as to specific rights. This section, however, necessarily affected other provisions in the Declaration of Rights by proclaiming each of the rights enumerated in the new section 24. The *Raven* court correctly pointed out that the new section 24 implicated "*fundamental constitutional rights* . . . including the rights to due process of law, equal protection of the law, assistance of counsel, and avoidance of cruel and unusual punishment."[274] The court further stated:

> [a]s to these rights, as well as other important rights listed in new section 24, California courts in criminal cases would no

267. 196 P.2d 787 (Cal. 1948).
268. *Id.* at 790.
269. *Id.* at 791-93.
270. *Id.* at 794.
271. *Id.* at 796.
272. *Id.* at 798.
273. *Id.*
274. *Raven*, 801 P.2d at 1087 (emphasis added).

> longer have authority to interpret the state Constitution in a manner more protective of defendants' rights than extended by the Federal Constitution, as construed by the United States Supreme Court. . . . Thus, [the new section 24] not only unduly restricts judicial power, but it does so in a way which severely limits the independent force and effect of the California Constitution.[275]

Despite this strong support for the doctrine of independent state grounds,[276] the California Supreme Court has not found that other voter-initiated changes to the declaration of rights have amounted to revisions even though such changes force the California courts to adhere to federal precedent.

The "Right to Truth-in-Evidence" provision of Proposition 8 purported to attack only one instance of the California Supreme Court's application of the doctrine of independent state grounds. The court held that section 28(d) only eliminated the court-created exclusion of evidence remedy for violating an accused's rights.[277] In *Brosnahan v. Brown*,[278] the court however, addressed the issue of revision or amendment in general terms and with respect to the proposition as a whole. When section 28(d) was later challenged as an impermissible revision in *In re Lance W.*, the court relied on its previous, but cursory, conclusion in *Brosnahan*.[279] Meanwhile, the "Right to Truth-in-Evidence" section of Proposition 8 greatly impeded the court's ability to protect the broader rights which the court claimed were not affected by the provision. By restricting courts' use of the exclusionary rule, section 28(d) limited the courts' ability to protect Californians' right to be free from unreasonable searches and seizures, right against self-incrimination, and right to access to evidence.

As to Proposition 115, the court in *Raven* held that constitutional amendments requiring reciprocal discovery,[280] allowing joinder of cases,[281] admitting hearsay evidence at preliminary hearings,[282]

275. *Id.* at 1087-88.

276. One commentator has asserted that in *Raven* the court stiffened the distinction between a constitutional amendment and a revision. Joseph Goldberg, Note, *Raven v. Deukmejian: A Modern Guide to the Voter Initiative Process and State Constitutional Independence*, 28 SAN DIEGO L. REV. 729, 738-39 (1991).

277. *In re Lance W.*, 694 P.2d 744, 752 (Cal. 1985).

278. 651 P.2d 274 (Cal. 1982).

279. *Lance W.*, 694 P.2d at 770.

280. "In order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the people through the initiative process." CAL. CONST. art. I, § 30(c).

281. "This Constitution shall not be construed by the courts to prohibit the joining of criminal cases as prescribed by the Legislature or by the people through the initiative process." CAL. CONST. art. I, § 30(a).

prohibiting post-indictment hearings,[283] and proclaiming the People's right to due process and a speedy and public trial,[284] do not constitute invalid revisions either "standing alone or in the aggregate."[285] Nevertheless, in addition to affecting the ability of California courts to independently interpret and protect the rights affected by the above provisions, these provisions also limit the affected rights themselves. Attempting to distinguish the above changes made by Proposition 115 from the holding in *Lance W.*, and a similar challenge in *People v. Frierson*,[286] the court stated that "the isolated provisions at issue [in those cases] achieved no far reaching, fundamental changes in our governmental plan."[287] The court said that none of the above examples "involved a broad attack on state court authority to exercise independent judgment in construing a wide spectrum of important rights under the state Constitution."[288]

This is not a principled application of the prohibition against constitutional revision through the initiative process. The implications of the court's holdings in *Raven*, *Brosnahan*, and *Frierson* are that the voters may slowly chip away at the rights declared in Article I, as they did with the "Right to Truth-in-Evidence" provision of Proposition 8, and sections of Proposition 115. The court will characterize such incremental changes as valid amendments. However, if the voters attempt to accomplish these smaller steps in one fell swoop, they will be attempting an invalid revision of the constitution.

The court must more fully explore the "qualitative" nature of constitutional changes which appear to be less sweeping than the changes proposed by section 5 of Proposition 115 and by the "California Bill of Rights" initiative challenged in *McFadden*. While the court in *McFadden* relied heavily on the mere "quantitative" nature of the changes proposed by the initiative in question, the court also closely examined some of the "qualitative" changes. The court looked to the

282. "In order to protect victims and witnesses in criminal cases, hearsay evidence shall be admissible at preliminary hearings, as prescribed by the Legislature or by the people through the initiative process." CAL. CONST. art. I, § 30(b).

283. "If a felony is prosecuted by indictment, there shall be no postindictment preliminary hearing." CAL. CONST. art. I, § 14.1.

284. "In a criminal case, the people of the State of California have the right to due process of law and to a speedy and public trial." CAL. CONST. art. I, § 29.

285. *Raven*, 801 P.2d at 1086.

286. 599 P.2d 587, 613-14 (Cal. 1979) (upholding a provision which essentially required the California courts in capital cases to interpret the state guarantee against cruel or unusual punishment in a manner consistent with federal precedent).

287. *Raven*, 801 P.2d at 1089.

288. *Id.*

fact that the proposition was entitled "California Bill of Rights." The court found this presented an apparent conflict with the title and subject matters in Article I of the Constitution, entitled "Declaration of Rights."[289] Proposition 8 was entitled "The Victims' Bill of Rights,"[290] which arguably creates confusion with California's Declaration of Rights. Furthermore, although the court in *Lance W.*, determined that the Right to Truth-in-Evidence" provision only eliminated a judicially created remedy, this section has been more broadly interpreted to extend not only to evidence seized in violation of article I, section 13, but also to statements obtained in violation of an accused's right against self-incrimination.[291] Additionally, the California appellate courts have extended section 28(d)'s exclusion of evidence to the remedy of dismissal.[292]

While the court determined that the reciprocal discovery provision in Proposition 115 "constitutes a specific exception to the broad privilege against self-incrimination,"[293] statutory amendments enacted by the initiative state that "no discovery shall occur in criminal cases except as provided by this chapter, . . . *or as mandated by the Constitution of the United States.*"[294] Thus, Proposition 115 not only created an "exception" to California's protection against self-incrimination, but also declared that the *Federal* Constitution, rather than the *state* constitution, would provide for any limitations on reciprocal discovery. The effect of this is to take interpretation of the privilege against self-incrimination outside the realm of the California courts and to leave such interpretation to the federal courts, at least as to limits on prosecutorial discovery. The California courts are again deprived of their power to independently interpret the state constitution.

The California Supreme Court should impose a more exacting qualitative standard to determine whether an initiative has revised, rather than amended, provisions in the Declaration of Rights. There is nothing in the court's reasoning in *Raven* to prevent the voters in future initiatives from enacting piecemeal changes to provisions in the Declaration of Rights which would have the effect of requiring the state courts to follow federal interpretation of similar rights. As the

289. McFadden v. Jordan, 196 P.2d 787, 794 (Cal. 1948).

290. CALIFORNIA BALLOT PAMPHLET; PRIMARY ELECTION 33 (June 8, 1982).

291. People v. May, 748 P.2d 307 (Cal. 1988)

292. People v. Epps, 182 Cal. App. 3d 1102 (1986) (holding that where dismissal would not be required under the federal constitution, based on the state's failure to preserve evidence, Proposition 8 precludes dismissal).

293. Izazaga v. Superior Court, 815 P.2d 304, 314 (Cal. 1991).

294. *Id.* at 315 (quoting CAL. PENAL CODE § 1054).

Raven court stated, "forced linkage"[295] would "substantially alter the substance and integrity of the state Constitution as a document of independent force and effect."[296] Despite this confirmation of the California Constitution's independent nature, these inconsistent holdings permit the voters to slowly chip away at the Declaration of Rights' independence by voting for specific exceptions to various sections over multiple elections, rather than adopting one measure to accomplish that goal. Because of the broad latitude the California Supreme Court has granted to the voters, it is unlikely the court will begin to impose a more exacting standard for the "no revision rule." The strongest proposal would be a compromise between the rights of the voters to link California's Declaration of Rights to federal interpretation, and the rights of all Californians to an independent state constitution.

C. Recent Use of the California Declaration of Rights

The current California Supreme Court, while granting great deference to the will of the voters, has nonetheless acknowledged the importance of the state constitution. Even where the court has ultimately concluded that federal precedent applied, the court has at least examined the state constitution. As discussed, the court in *Izazaga v. Superior Court*[297] held that the reciprocal discovery provision enacted by Proposition 115 constituted an exception to the state privilege against self-incrimination; but the court also held that "the California Constitution continues to afford criminal defendants an independent source of protection from infringement of certain rights. . . ."[298] In addition, the *Raven* court used strong language to support the importance of the independent state grounds doctrine. Nonetheless, the court's current analysis of when the doctrine should apply is no more reasoned than in the days of *Brisendine* and *Disbrow*.

In *Tapia v. Superior Court*,[299] the court held that certain provisions of Proposition 115 could be applied to prosecutions of crimes committed before the Proposition's effective date.[300] Robert Allen Tapia challenged retroactive application of Proposition 115 on state and federal ex post facto grounds. The California Declaration of Rights, section 9, provides, "[a] bill of attainder, ex post facto law, or

295. Slobogin, *supra* note 39, at 664.
296. Raven v. Deukmejian, 801 P.2d 1077, 1087 (Cal. 1990).
297. 815 P.2d 304 (Cal. 1991); *see supra* notes 249-53 and accompanying text.
298. *Id.*, 815 P.2d at 314.
299. 807 P.2d 434 (Cal. 1991).
300. *Id.* at 446.

law impairing the obligation of contracts may not be passed."[301] The United States Constitution provides "[n]o state shall . . . pass any . . . ex post facto law."[302] The court in *Tapia* appears to have set out a framework under which the court will determine whether California's constitution should be interpreted differently from equivalent federal provisions. First, the court looked to the textual similarities, and concluded nothing in the language of California's provision supported an interpretation different from federal interpretation.[303] Next, the court examined the history of the state provision, and concluded that California had only followed the broader "substantial protection" analysis when forced to do so by the Supremacy Clause.[304] While federal precedent had long adhered to the "substantial protection" analysis, a little over two weeks after Proposition 115 was approved, the United States Supreme Court had rejected the "substantial protection" analysis in *Collins v. Youngblood*.[305] Finding no "independent footing in the state Constitution,"[306] the *Tapia* court followed the *Collins* interpretation of the federal ex post facto clause.

The California Supreme Court is now applying the doctrine of independent state grounds backwards. The court should not look for a reason to apply the California Constitution, but rather for a reason to follow federal interpretation, even where California interpretation employs federal precedent. Again, simply because a state court has decided to adopt the law of another jurisdiction, this does not forever bind that state to the future case law of the other jurisdiction. Furthermore, the *Tapia* court ignored California's "long standing presumption . . . that new nondecisional law operates prospectively."[307]

California courts, in order to preserve the integrity of the state constitution, should base decisions first on the text of the state constitution, then on state constitutional and common law, and finally on preexisting state law. After a decision is reached based on these elements of state law, the state court should examine federal law for any possible violation.[308] The state's Declaration of Rights must receive

301. CAL. CONST. art. I, § 9.

302. U.S. CONST. art. I, § 10, cl. 1. The United States Constitution imposes a similar limitation on the federal government. U.S. CONST. art. I, § 9, cl. 3.

303. *Tapia*, 807 P.2d at 441.

304. *Id.* at 442.

305. 497 U.S. 37, 44-47 (1990) (restricting application of the ex post facto clause in the Federal Constitution).

306. *Tapia*, 807 P.2d at 442.

307. *Id.* at 448 (Mosk, J., dissenting) (citations omitted).

308. This is a variation of criteria set out by the Washington Supreme Court in State v. Gunwall, 720 P.2d 808, 812-13 (Wash. 1986).

some insulation from voter whim in order to give state courts the opportunity to independently examine state rights.

VI. Super Majority Proposal

There have been a number of proposals for altering the methods by which the voters may initiate changes to the constitution, but few focus on the need to preserve the doctrine of independent state grounds. This dimension of preserving the independence of the state constitution adds a layer of complexity to proposals for revamping the initiative process.

Usually the type of proposal offered depends on what the commentator perceives as "the problem." Commentators concerned with voter understanding, abuse of the process, and the opportunity for deliberation and debate, usually offer proposals which focus on the initiative *process*. For example, one commentator has urged the adoption of expedited legislative involvement.[309]

Some states which provide for the initiative only allow "indirect" use of the initiative. That is, proponents of a proposition must first present the proposal to the state legislature and give that body an opportunity to adopt the proposal, or a proposal which is substantially similar. If the legislature fails to act, then the proposition usually goes on the ballot. States which employ the indirect initiative usually require a minimal percentage of signatures at the petition stage before the proposal will be presented to the legislature. If the legislature fails to act, proponents must then obtain additional signatures before submitting the proposal to the voters.[310] This solution presents a number of problems. First, it is unlikely the people of California would be willing to give up direct access to the ballot. While the state legislature is certainly more free from domination by interest groups, a situation which initially spurred the adoption of direct democracy, voters will want to maintain the direct check which they now possess. Secondly, the proposed procedure is too complex and costly for the goals it attempts to achieve—complex in that it involves, or could involve, all of the other branches of government *before* anything is submitted to the voters. Many proponents of the direct initiative are likely to argue that the time lag between the first round of signatures and the second would deprive proponents of propositions of the initial enthusiasm for their proposals. This accounts for the additional costs. Al-

309. Nick Brestoff, Comment, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922, 953-58 (1975).

310. *See id.* at 924.

ready a tremendous amount of resources and time are required just at the signature gathering stage.[311] To further stretch out this time would result in far fewer initiatives surviving. Furthermore, it is likely that those which do survive will do so only because the proponents have ample funds to keep the proposal alive, and a class bias may develop. Finally, this solution does not address the true problem with the voter initiative. While the process could benefit from some opportunity for deliberation and debate before the proposed change reaches the signature stage, the proposal described above would not provide any additional insulation of the Declaration of Rights from majority whim. Even if Propositions 8 and 115 had first been submitted to the legislature, and the legislature had expressed concern that certain sections of these propositions could deprive the state constitution of its independence, the proponents of the measures could nonetheless have placed the measures on the ballot. While the voters may understand the legislature had these concerns, the high emotions and passions surrounding "victims' rights," would probably have spurred the voters to adopt the proposals regardless of the opportunity for debate.

One commentator has expressed concern that the California Constitution is in danger of becoming a mere statute.[312] This commentator proposes that initiative law be a separate body of law, subject to the constitution, but superior to legislatively enacted law. The proposal would still allow the voters to amend the constitution, but only by a two-thirds or sixty percent vote, rather than a simple majority.[313] While this proposal would provide greater protection to Article I of the California Constitution, it would restrict the voters with respect to the remaining articles. The rest of the constitution is by now far too detailed to justify this type of limitation. Unless the rest of the constitution can be "cleaned up," the voters should not be restricted from amending the other articles.

Other commentators have proposed several methods to check voter whim and caprice. Each proposal, however, would leave the final determination of validity to the federal courts. One commentator discusses the lack of the types of "checks" in the initiative process which are inherent in the legislative process, and states that this difference should compel greater judicial scrutiny of initiatives than of legislative acts.[314] But this commentator also acknowledges that most

311. MAGLEBY, *supra* note 168, at 61-70.
312. Note, *California's Constitutional Amendomania*, 1 STAN. L. REV. 279 (1949).
313. *Id.* at 287-88.
314. Eule, *supra* note 193, at 1558-73.

states which allow for the initiative also allow for voter recall of judges.[315] The commentator then suggests that the protection of minority rights be left to the federal courts. As this article has discussed, when the federal courts began to shirk their duty as "guardians of minority rights,"[316] states began looking to their own constitutions in order to maintain, and even expand the rights available in the Federal Constitution. By surrendering their ability to protect these rights to the federal courts, state constitutions will lose all of their independence, and may lead one to question the reason for retaining state declarations of rights.

Former Chief Justice of the Oregon Supreme Court, Hans Linde, has argued for enforcement of the "guaranty clause" with respect to initiatives.[317] He acknowledges that the United States Supreme Court has held that issues regarding the guaranty clause are non-justiciable political questions. He argues, however, that this should not prevent state courts from interpreting the clause. This proposal also fails because even if a state supreme court held an initiative violated the guaranty clause, the decision could be appealed to the United States Supreme Court, which would either summarily reverse the decision, or provide an opinion stating that such issues are non-justiciable. Once again, the ultimate issue would be left to the federal courts and state constitutional independence would be undercut.

Proposing substantive restrictions on amending the Declaration of Rights by initiative, would be an attractive option, but is fraught with problems. First, such a limitation would put the burden on the courts to determine when an initiative has violated the rule. As discussed with respect to other restrictions enforceable by the judiciary, namely the single-subject and no revision rules, courts are very hesitant to apply these rules strictly to initiatives, and historically have granted initiatives great deference. This is unavoidable when judges may be recalled by the voters and are thus directly accountable to them. Secondly, Propositions 8 and 115 have already taken away rights previously preserved by other sections of article I, under the guise of *adding* new rights—the rights of victims. There is no principled method for distinguishing between the limitation or elimination of certain rights and the granting of "new" rights, except perhaps in extreme cases.

315. *Id.* at 1579-82.

316. *Id.* at 1542.

317. Hans A. Linde, *When is Initiative Lawmaking Not "Republican Government?"*, 17 HASTINGS CONST. L.Q. 159, 160-61 (1989).

Another possible solution would be to revise the constitution to restrict the voters' ability to amend the constitution to only articles II through XXXIV. In other words, insulate all of article I by prohibiting any amendments by initiative. As tempting as this proposal may be, it too presents significant problems. Voters are extremely protective of their right to participate directly in the law-making process, and would likely vehemently resist an attempt to put any initiative aspect completely beyond their reach. Moreover, such a limitation would deprive the voters of the opportunity to define and enact "new" rights. For example, the right to privacy was not expressly provided for in the state constitution until the voters approved the provision in 1974. While one might disagree with the way voters have expressed the "rights of victims," rights are evolving, and not static. To place the Declaration of Rights completely beyond the reach of the voters would deprive the Californian people of the opportunity to express new rights.

The Massachusetts Constitution protects rights from alterations by the electorate. Massachusetts allows only indirect initiatives, and further forbids any changes affecting freedom of speech, press, elections, assembly, just compensation, and the right of access to the courts.[318] As a result, since the initiative was adopted in Massachusetts, there have been only two constitutional amendments proposed.[319] In Illinois, the only initiatives which the voters may propose are constitutional amendments affecting the state legislature.[320] While these types of limitations would certainly insulate California's Declaration of Rights, it is likely that the voters of California would not accept putting anything completely beyond their reach.

A super-majority proposal is clearly the most superior. This proposal achieves a balance between the competing interests of the voters' right to make law, and the right of all Californians to a constitution which is independent of the Federal Constitution. As simplistic as it may sound, the voters may continue to propose amendments to the state's Declaration of Rights by obtaining the same percentage of signatures as are now required, but an amendment to the Declaration of Rights will only become law if passed by a super majority of three-fourths, or seventy-five percent, of voters who vote in

318. MASS. CONST. amend. art. XLVIII.

319. DUBOIS, *supra* note 189, at 16.

320. ILL. CONST. art. XIV, § 3.

the election.[321] Currently, an initiative becomes law if passed by a simple majority of those who *vote on that initiative.* The percentage should be based on the number of voters who participate in the particular election because some voters may refrain from voting on some measures. Voters may refrain from voting on an initiative which is farther down the list of initiatives, or simply because they do not understand the particular initiative.[322] Such disinterest and confusion should be considered when determining whether an initiative becomes law.

The percentage for passage, rather than the percentage for qualification for the ballot, is important because voters, for a variety of reasons, will sign petitions without reading or fully understanding them.[323] Some, for instance, may sign as a result of peer pressure; others may sign simply to get the signature gatherer to move on, and still others may sign without understanding that they are qualifying the proposition for the ballot. By concentrating on the numbers needed for passage, only those amendments to the Declaration of Rights which are meritorious, and not simply a result of whim or caprice, will be enacted. Proposition 8 passed by a majority of 56.4%,[324] and Proposition 115 passed by 57.03% of the vote.[325]

Rather than attempt to make it more difficult for the voters to amend *any* portion of the Constitution, this proposal is limited to the Declaration of Rights, which sets forth individual fundamental rights. This is because of the structural argument that declarations of rights are different from other parts of a constitution.[326] Furthermore, extending this proposal to the entire California Constitution would simply be impractical. The reality of the situation in California is that articles II through XXXIV, while laying down some enduring principles, are replete with details, and require regular fine-tuning and refinement. Ideally, California should streamline its constitution and place many of the constitutional sections within its statutory law; this is unlikely to occur, however, due the extreme detail already present

321. The California Constitution requires a super-majority vote with respect to local debts. CAL. CONST. art. XVI, § 18 ("No county, city, town, township, board of education, or school district, shall incur any indebtedness . . . exceeding in any year the income and revenue provided for such year, . . . without the assent of two-thirds of the qualified electors thereof").

322. MAGLEBY, *supra* note 168, at 142-44.

323. *Id.* at 62-64.

324. SECRETARY OF STATE, STATEMENT OF THE VOTE; PRIMARY ELECTION 45 (June 8, 1982).

325. SECRETARY OF STATE, STATEMENT OF THE VOTE 8 (June 5, 1990).

326. *See supra* notes 33-38 and accompanying text.

in the constitution. For this reason, as well as those set out earlier, this Article's proposal is limited to California's Declaration of Rights.

Finally, this proposal does not simply argue the broader view that more rights are always better and that voters should not be able to override California Supreme Court opinions which provide for broader protection of rights than guaranteed under the federal constitution. While all Californians might well benefit from broader rights, this Article's main concern is with the limitations on the California judiciary's ability to independently examine the state constitution. Propositions 8 and 115 have been interpreted to link state interpretation to federal precedent, which effectively deprives the state constitution of its independence and the California judiciary of its ability to consider unique circumstances.

Furthermore, such linkage will force California courts to defer "all judicial interpretive power" to the federal courts.[327] If a particular California Supreme Court ruling makes voters unhappy, the voters may alter those rulings.

Some might criticize this proposal as result-oriented. Not only does it seek to preserve individual and sometimes unpopular rights, it also seeks to preserve the integrity of California's Declaration of Rights. More important than insulating individual rights from voter caprice, is the goal of maintaining the independence of California's courts to interpret the state constitution, and not be forced to look only to federal interpretation of similar rights.

This analysis and proposal should not be read as mere disagreement with expressing rights for crime victims. There is merit to such rights, but the creation and protection of victims' rights should not result in a chipping away of rights possessed by all Californians, and should not strip California's Declaration of Rights of its independence from the United States Constitution.

327. Raven v. Deukmejian, 801 P.2d 1077, 1086 (Cal. 1990).